

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRIEDA BEACHAM

Claimant

VS.

PROVIDENCE MEDICAL CENTER

Self-Insured Respondent

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Docket No. 264,010

ORDER

Respondent requested review of Administrative Law Judge Robert H. Foerschler's November 12, 2002, Award. The Board heard oral argument on May 21, 2003. Gary M. Peterson was appointed Board Member Pro Tem to participate in the determination of this review.

APPEARANCES

John G. O'Connor of Kansas City, Kansas, appeared for the claimant. Gregory D. Worth of Overland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant suffered an accidental injury on August 7, 1998, and a series of aggravations to her condition through her last day worked on November 2, 2000. The ALJ awarded claimant a 43.5 percent work disability based upon a 57 percent task loss and a 30 percent wage loss.

The respondent requests review of: (1) whether the claimant met with personal injury by a series of accidents or just the admitted single traumatic accident on August 7, 1998; (2) whether the claimant served timely written claim; (3) whether the claimant is entitled to temporary total disability benefits; (4) whether the treatment claimant received

from Dr. Moussa was authorized; (5) the nature and extent of claimant's disability; and, (6) whether Dr. Moussa should be designated to provide future medical care or should the determination of future medical care be made upon application to the Director.

Conversely, the claimant requests the ALJ's Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Ms. Beacham was employed by Providence Medical Center as a food service aide. Her job duties included preparing the patient food trays, putting them on a cart and delivering the food trays to the patients. Claimant would then pick up the trays, place them on the cart and bring the trays back and send the dishes to be washed. This process is then repeated for the lunch and evening meal. Claimant also pushed a stocked cart at night which was loaded with dry goods and beverages to stock the refrigerators.

On August 7, 1998, claimant was performing her job duties picking up food trays and placing them on the cart. As claimant began pushing the cart she felt and heard a snap in her right upper hip. By the time claimant got downstairs she could not stand erect. Claimant advised her supervisor and was sent for treatment at OHS Comp Care.

The claimant was diagnosed with low back strain, provided medications and advised to rest. Claimant had the weekend off and when she returned to work her back still hurt so she went back for additional treatment. At the second visit on August 10, 1998, claimant was released to modified duty with no lifting, pushing, pulling over 20 pounds and no repetitive bending. Claimant returned to work within her restrictions.

On August 17, 1998, claimant returned for an office visit with complaints of continuing hip pain as well as a charley horse sensation in her right leg. By August 21, 1998, the medical records of her visit indicate claimant reported she "had absolutely no pain" and that she wanted to go back to full duty work. Claimant denied she made those statements to the doctor. Claimant was released to full duty work following that office visit.

Claimant returned for another office visit on October 6, 1998, and she complained of right leg discomfort for a week but stated she could not remember any injury that might have caused the onset of the leg pain. An x-ray was taken and claimant was diagnosed with "non-occupational piriformis syndrome." Claimant was advised to see her personal physician about this condition.

Claimant never requested additional medical treatment from respondent after this office visit. Instead, she sought treatment with her personal physician as she had been

advised. Claimant saw her personal physician Dr. Halle Moussa the next day. Claimant was provided medication and returned to work without restrictions.

As claimant continued working over the next two years she noted that her condition initially got better but later the pain returned and progressively worsened. She complained that she began having leg, back and arm spasms as well as chest pains. As claimant continued working she complained to her supervisor that pushing the carts was causing more back pain. As previously noted, claimant did not request additional medical treatment be provided by respondent.

The record is not entirely clear but during the time she continued working it appears she continued to occasionally see Dr. Moussa who prescribed medications. An MRI of claimant's lumbar spine on April 21, 1999, revealed some bulging at L5-S1, but Dr. Moussa concluded those findings were not significant.

In October 2000, claimant began experiencing episodes of chest pain. On October 18, 2000, claimant went to the emergency room with chest pain complaints. But she was released to return to work. Claimant's personal physician ordered a stress test and then claimant was referred for a heart catheterization. On November 2, 2000, claimant returned to the emergency room with complaints of pain in her chest, hip, leg, back and arm. She was given a shot of pain medication.

On November 13, 2000, claimant again returned to the emergency room for low back pain and received another shot of pain medication. Claimant's personal physician referred her for physical therapy and then to a pain clinic for a series of epidural injections in her back. Claimant's last treatment was when her physical therapy ended on March 6, 2001. An MRI was performed on March 5, 2001, which revealed a focal disk protrusion to the right at L5-S1.

Claimant has not worked since November 2, 2000. She applied for short-term disability after her sick leave ran out in February 2001. When she filled out the form she indicated her disability was not work related. She agreed that her chest pains are a significant factor in her inability to work.

Whether claimant suffered a series of accidental injuries?

Respondent admits claimant suffered an accidental injury on August 7, 1998, but argues claimant failed to meet her burden of proof to establish she suffered a series of work-related accidents after that date when she returned to work.

It is well established under the Workers Compensation Act in Kansas that, when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify

a preexisting condition, the aggravation becomes compensable as a work-related accident.¹

Claimant's uncontradicted testimony was that as she continued to perform her job duties her back condition became progressively worse. It was also uncontradicted that she notified her supervisor that pushing the cart was causing her back pain. While the MRI performed in April 1999 revealed bulging at the L5-S1 level, the MRI performed in March 2001 revealed a focal disk protrusion to the right of L5-S1. This objective finding corroborates claimant's testimony that her condition worsened. Dr. P. Brent Koprivica opined that as claimant continued working she sustained further injury as confirmed by the disk protrusion. The Board finds claimant suffered repetitive trauma to her low back while performing her job duties through her last day worked on November 2, 2000.

The Board is not unmindful of Dr. Chris D. Fevurly's opinion that claimant's condition was unchanged from the August 7, 1998, incident and that the MRI technician's language was different but they described the same condition. But Dr. Fevurly agreed that when a radiologist dictates an MRI report the words bulge and protrusion are not used interchangeably and normally protrusion means something more than just a bulge.

Timely Written Claim

The written claim statute, K.S.A. 44-520a, provides in part:

(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

Respondent's argument claimant failed to file a timely written claim was premised upon the fact that claimant only suffered accidental injury on August 7, 1998. But the Board concludes the claimant suffered a series of aggravations through her last day worked on November 2, 2000. Accordingly, the date of accident is November 2, 2000.² The application for hearing was filed February 16, 2001, which was within 200 days of the date of accident. The Board finds claimant made timely written claim.

¹ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

² See, *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

Nature and Extent of Disability

Dr. Koprivica opined claimant had a 10 percent whole person impairment based upon the *AMA Guides*³. Conversely, Dr. Fevurly opined claimant had a 5 percent whole person impairment based upon the *AMA Guides*. The ALJ ordered an independent medical examination be performed by Dr. Terrence Pratt. Based upon the *AMA Guides*, Dr. Pratt opined claimant suffered a 7 percent whole person impairment as a result of her work-related injury on August 7, 1998, and the subsequent progression of her condition. The ALJ concluded claimant suffered a 7 percent whole person impairment and the Board adopts that finding.

Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*⁴ and *Copeland*.⁵ In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. Neither the presumption nor the wage earning ability test are in the current statute,⁶ but in reconciling the principles of *Foulk* to the new statute, the Court of Appeals in *Copeland* held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than

³ American Medical Ass'n *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁴ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140, rev. denied 257 Kan. 1091 (1995).

⁵ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁶ See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 802, 975 P.2d 807 (1998).

actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.⁷

It is undisputed that claimant's last day working for respondent was November 2, 2000. After that date she used all of her sick leave and then obtained disability benefits by alleging her condition was not work related. It is further undisputed claimant has not sought any type of employment since leaving work for respondent.

Claimant continued working without restrictions after her initial work-related incident on August 7, 1998. Claimant never requested medical treatment from respondent either before or after she stopped working and apparently only saw her personal physician occasionally. A few weeks before claimant quit work she reported chest pains and went to the emergency room seeking treatment for that condition. She agreed that she quit working because she was unsure whether the chest pain was caused by her heart.

Neither doctor restricted claimant from work and Dr. Fevurly concluded claimant could return to her former employment with respondent. Because claimant left work for reasons unrelated to her back and thereafter failed to attempt to return to any employment, the Board concludes claimant's actions were tantamount to a refusal to work and adopts Dr. Fevurly's conclusion claimant retains the ability to perform her job with respondent. Because she voluntarily quit a job she retained the ability to perform that paid a comparable wage she is limited to her functional impairment.

After the August 7, 1998 incident pushing the cart, claimant received treatment from Dr. Don Mead for a back strain and was released to full duties on August 21, 1998. When claimant returned to Dr. Mead on October 6, 1998, to obtain medication refills, the doctor told claimant her continuing complaints were unrelated to the original incident at work and that she should see her personal physician.

Claimant sought treatment with Dr. Moussa on a number of occasions over the next two years but she never requested treatment be provided by respondent. Because claimant never requested medical treatment be provided by respondent, she is limited to her unauthorized medical for the payment of the treatment provided by Dr. Moussa.⁸

And because the doctors agreed claimant was at maximum medical improvement, any future medical treatment shall be upon proper application to the Director.

⁷ *Copeland* at 320.

⁸ K.S.A. 44-510h(b)(2).

Lastly, the Board concludes claimant has failed to meet her burden of proof that she is entitled to temporary total disability compensation. Although Dr. Koprivica opined claimant was temporarily totally disabled from the date she left work on November 2, 2000, until he saw her on September 8, 2001, that testimony is based upon speculation and there is no evidence that her personal physician had claimant off work after she unilaterally quit work.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated November 12, 2002, is modified.

The claimant is entitled to 29.05 weeks of permanent partial compensation at the rate of \$254.62 per week or \$7,396.71 for a 7 percent functional whole body disability which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of June 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director